

# Brexit as Fate

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2019-08-30T08:26:00

What Boris Johnson has pulled off this week is not a coup nor a constitutional crisis. He did not openly renounce his obedience to the constitution, no-one was arrested, no shot was fired.

No, what he has done is, in a way, even worse.

The United Kingdom, as the name suggests, is not a republic of free and equal citizens but a monarchy, based on the counterposition of Crown and Parliament. Parliament is sovereign, but not necessarily the highest institution in the state from which all others derive their authority. There are things the Crown can do in its own right. This includes ending the current session of Parliament and starting a new one, which implies an in-between period of some length when there is none, so to speak – the notorious "prorogation of Parliament".

Under usual circumstances, prorogation appears to be mostly a formality. One of those adorably pompous, gold-adorned, irony-tinged rituals full of ermine fur and ancient French that the venerable British parliamentary system is in such abundance of. I wouldn't take these things too lightly, though, steeped as they are with the scent of hundreds of years of parliamentary experience. Most of all, they are part of a procedure which makes collectively binding decisions possible in the first place.

Procedure matters. A decision taken in a correct procedure is more likely to be accepted even by those who disagree with its content. The dispute about substance is disburdened by the procedural form. A variety of interests and opinions can coexist in a pluralistic democracy to the extent of procedures being in place and allowing them to compete without taking up arms against each other.

++++++A Note by WZB++++++

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*The WZB Berlin Social Science Center is offering a position for a **Research Fellow (post-doc) (f/m/x)** at the WZB's Center for Global Constitutionalism headed by Professor Dr. Matthias Kumm. The position is to be filled full-time from 1 January 2020 until 31 August 2021. Candidates are expected to conduct research on comparative, European or international constitutional law or the history and theory of constitutionalism. Applications must be submitted by **16 September 2019**. More Details [here](#).*

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This only works, however, if the rules of the procedure are not drawn into the substantial political dispute themselves. Many of these rules are informal conventions, especially in no-written-constitution UK. There is no precise idea of what happens if they are not followed, precisely because they just are. There is no need for formalized rules: you simply don't do it, no matter what your political convictions are. You could perhaps, but you don't, because you know that this would hurt the effectiveness of the whole system in producing collectively binding decisions, and why would anybody want that?

The interesting and frightening thing is, though, that in recent years the number of political actors who do seem to want just that has increased dramatically. The Polish PiS government has earned particular notoriety for itself in that respect: From their refusal to publish judgments of the Constitutional Tribunal in the Official Gazette to their misuse of disciplinary proceedings against judges they dislike, they have proven time and again that they will transform any innocent procedure into a political bludgeon if it suits their plans. In the US, where "constitutional hardball" (Mark Tushnet) has long been part of the political repertoire, the original sin was committed before Donald Trump was elected, with the Senate Republicans under Mitch McConnell refusing to even put Obama's Supreme Court candidate Merrick Garland on their agenda.

## **Boris as Moses**

When Boris Johnson turned prorogation of Parliament into a tool to distress his opponents with, he engaged in exactly the same sort of depletion of constitutional resources as PiS, Republicans, and so many others in the world. In one respect, however, he goes even further: It's not even that he wants to decide anything in this matter. No-deal Brexit is not a decision, on the contrary: it's the absence of a decision. It's what happens if nothing happens, if no-one is taking any decision and the ensuing responsibility for it. It happens by itself, through the sheer passage of time. A matter of fate, if you will.

That seems to me to be the reason why the prospect of no-deal exerts such an irresistible pull among Brexiters. It promises them what they long for the most: fate. I owe to Kalypso Nicolaidis' book on the ["Three Meanings of Brexit"](#) the insight how much Brexiters are driven by the desire to be the collective subject of a great mythical exodus. They long for that fateful exodus that transforms their teeming mass of lost and tormented individuals, straying helplessly around the pyramids of the financial markets, into a chosen people: Pharaoh, let my people go! All warnings that it will be a horrible experience, that they will wander through the desert for 40 years just harden their resolve: Oh, fateful, is it? Sounds just about right.

Johnson wants to be the Moses of this people, if only to keep Farage from taking this role. And Moses does not decide. Moses leads, but he does not decide. It is not his responsibility what is happening. This is not some political decision about some legislative package that is made in an orderly, procedurally correct way and for which one can be held accountable. It is... well, what is it? No one knows. A fanciful lie about a promised land full of milk and honey and border control technology and trade

agreements, which has been promised to the people by some higher will and where it therefore must be led, I guess.

For three years now, this myth in the making has been rampaging through Europe like a tornado with ever-increasing violence, shredding to pieces everything it touches: the deal with the EU, peace in Ireland, the very Union of the Kingdom itself – whatever crosses the mythical Exodus incurs the wrath of the Lord and is laid waste to unforgivingly. Now even Parliament, whose sovereignty is the very core of the British Constitution.

This, if Johnson gets away with his stunt, would henceforth be part of the founding myth of the post-Brexit Kingdom: Parliament had taken Pharaoh's side and was punished. It can never be trusted anymore.

That alone is reason enough for Parliament to not let this happen. It must insist on a decision in the interest of the people it represents and for whom it bears responsibility. Next week we'll know if it has succeeded.

## Not too late yet

The Verfassungsblog editorial is back from its summer break, and it appears a day earlier than it used to, on a Friday – an experiment, as I have heard from many that they don't read emails on weekends. Others however *prefer* reading emails on weekends. So Friday seems to be a good compromise.

Verfassungsblog itself hasn't paused in the meantime, however. *A lot* has happened. In order to stay reasonably brief, I'll limit my review to the last two weeks:

First of all, the **UK**: The innovative and hope-inspiring proposal of [JOSEPH H.H. WEILER, DANIEL SARMIENTO and JONATHAN FAULL](#) as to how a no-deal Brexit could still be avoided if both sides want to, has stirred a tremendous debate. A FAQ with responses to critique is [here](#), and a further rejoinder by JOSEPH H.H. WEILER is [here](#).

[STEFAN THEIL](#) delves into the details of **British** parliamentary law and considers it conceivable that Johnson's government could extend the prorogation period until the end of October when the fate of no-deal Brexit will be sealed.

++++++A Note by EURAC++++++

*Are you interested in federalism and language? Apply for the **Winter School on Federalism and Governance 2020**, a two-week international postgraduate program that combines theoretical expertise and relevant case studies. The Winter School takes place from 17 to 28 February 2020 in Innsbruck, Austria and in Bolzano/Bozen, Italy. It is organized by the Institute for Comparative Federalism at Eurac Research in Bolzano/Bozen, and by the Faculties of Law and of Social and Political Science of the University of Innsbruck. The application deadline is 11 October 2019. More details here: <http://winterschool.eurac.edu/>*

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Anyone who wants to see something nice and pleasing for a change will likely look south these days: In **Italy**, Matteo Salvini's far-right Lega, for all their cunning plans, seem to have successfully sidelined themselves after all. [GIUSEPPE MARTINICO](#) had played through the options for forming a government without new elections two weeks ago.

In **Germany**, or more precisely in the federal capital Berlin, the resilience of the fundamental right to property is being put to test with daring ideas for the capping of residential rents, encouraged by a Federal Constitutional Court decision which [HEIKO SAUER](#) analyses.

In a **Belgian** case, the European Court of Human Rights has ruled on the European arrest warrant, which [LUC VON DANWITZ](#) interprets as a sign of better cooperation between Stras- and Luxembourg.

In **Montenegro**, the Supreme Court has handed down a ruling with stunningly Kafkaesque consequences, as [MIRKO #UKOVI#](#) reports.

In **Poland**, parliamentary elections will take place in autumn. In an interview with [WOJCIECH SADURSKI](#), we discussed the question of what happens if PiS is re-elected – and what if it isn't.

[BALU GOLAPAKRISHNAN NAIR](#) investigates whether the Supreme Court of **India** could declare the government's decision to annul the special status for Kashmir unconstitutional. [ZAID DEVA](#) explains the constitutional and historical background.

And on the occasion of our own 10th anniversary, which we are celebrating this summer, we have received a wonderful letter of congratulations from our long-time fellow Verfassungsblogger [ALEXANDRA KEMMERER](#).

## Elsewhere

[LAURENS LAVRYSEN](#) criticises the ECtHR for its judgment on **Russia's** refusal to register LGBT organisations and, in particular, for declaring inadmissible the action brought by an LGBT activist on account of his abusive social media statements against the Strasbourg Court.

[MARIA PANKOWSKA](#) gives an overview of the stunning revelations about the conspiracy around the **Polish** Deputy Minister of Justice #ukasz Piebiak to deliberately slander judges targeted by the government.

[ALAN S. REID](#) illuminates the chances of stopping prorogation of Parliament in the **United Kingdom** by judicial means.

[MICHAEL C. DORF](#) uses the rain forest fires in **Brazil** for a passionate plea for vegan nutrition.

[MING-SUNG KUO and HUI-WEN CHEN](#) decode the message of the recent case law of the Constitutional Court of **Taiwan**.

[MANUEL BRUNNER](#) acknowledges the role of the withdrawal of **Sudan's** membership in the African Union in bringing down the military dictatorship.

So much for this week. Oh, and don't forget: you wanted to support Verfassungsblog on [Steady](#), remember? So many times you've decided to, and yet somehow you still haven't, right? Come on!

All the best, and take care,

Max Steinbeis

